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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: 08.02.2017

\+ **FAO(OS) 24/2017**

PADMAWATI BHALLA ..... Appellant

versus

MASTER SAHIL AND ORS ..... Respondents

Advocates who appeared in this case:

For the Petitioners : Mr Abhishek Singh.

For the Respondent : Mr Vaibhav Jain, Adv. for R-1 & R-3 along with respondent Nos.1 and 2 in person.
Mr Amit Bhalla, Adv. for R-4 & R-5 with R-6 (ii) in person.

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE ASHUTOSH KUMAR

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. This appeal has been filed being aggrieved by the order dated 22.12.2016 whereby the learned single Judge refused to clarify/modify the order dated 23.05.2016 passed by another learned single Judge in IA No.6536/2016 which was an application under Order 23 Rule 3 CPC.

2. The appellant is aggrieved by the fact that the Registry is insisting that the decree followed by the order dated 23.05.2016 ought to be stamped as an instrument of partition under Section 2 (15) of The Indian Stamp Act, 1899 read with Schedule I of Article 45 thereof.

3. The case of the appellant as also of the respondents, who are all

aggrieved, is that the decree which is to be drawn up pursuant to the order dated 23.05.2015 should not be construed as a decree of partition but as a declaratory decree. Their case is that although in the suit for the partition a preliminary decree had been passed, subsequently, the parties entered into an oral settlement and also divided the properties by metes and bounds without any written instrument. It is thereafter that the Memorandum of Understanding, for the reason of recording for posterity the terms of the settlement already arrived at, was entered into. The Memorandum of Understanding was entered into on 15.05.2016 and the oral settlement was made the basis for the application under Order 23 Rule 3 CPC.

4. We agree with the submissions made by the learned counsel for the parties that the decree that followed the order dated 23.05.2016 ought to be regarded as a declaratory decree and not as an instrument of partition. There is a judicial authority for this. A Division Bench of this court in the case of ***Nitin Jain vs. Anuj Jain & Ors.*** observed as under:-

> "7. However, Courts have recognised oral partitions in cases of joint families. An oral partition is not an instrument of partition as contemplated under Section 2(15) of the Stamp Act. Therefore, as it is not an instrument, on an oral partition no stamp duty is payable.
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> 8. The Courts have recognised that it is legally permissible to arrive at an oral family settlement dividing/partitioning the properties and thereafter record a memorandum in writing whereby the existing joint owners for the sake of propriety record that the property has been already partitioned or divided. The memorandum does not by itself partition the properties but only records for information what has already been done by oral partition. The memorandum itself does not

create or extinguish any rights. A record of oral partition in writing is created. The writing records a pre existing right and does not by itself partition the properties for the first time. As the memorandum only records oral partition which has already taken place but does not in praesenti create any right, it cannot be treated as an instrument creating partition. Refer, Tek Bahadur Bhujil versus Debi Singh Bhujil and others reported in AIR 1966 SC 292), Bakhtawar Singh v. Gurdev Singh reported in (1996) 9 SCC 370, Kale v. Dy. Director of Consolidation reported in (1976) 3 SCC 119 : Rosan Singh v. Zile Sing reported in AIR 1988 SC 881 and Bachan Singh v. Kartar Singh and others reported in 2001 (10) JT (SC) 64.

9. In view of the legal position explained above, it follows that a decree of partition is an instrument of partition and therefore is required to be stamped under Schedule 1 of Article 45 r/w Section 2(15) of the Stamp Act. However, an oral family settlement dividing or partitioning the property is not required to be stamped. Similarly, a memorandum recording an oral family settlement which has already taken place is not an instrument dividing or agreeing to divide property and is therefore not required to be stamped.

10. Relevant paragraphs of the application for compromise and the orders passed by the Court have been quoted above. In the application it is specifically stated that the parties had entered into an oral family settlement and had distributed movable and immovable properties. In fact it is further stated that the parties had already been put in possession of the respective portions and the possession had been taken over. The compromise application merely records the oral family settlement to avoid any ambiguity. Therefore, in this case the Court was not required to pass any decree of partition but only declare the existing factual position on the date when the compromise application was filed, that the parties had entered into an oral family settlement and had partitioned and separated the properties amongst themselves. It was a

decree of declaration that there exists an oral family settlement that was passed and no decree that amounts to an instrument of partition under Section 2(15) of the Stamp Act was passed. Thus, the objection raised by the Registry that the appellant and other co-owners must furnish valuation report and pay stamp duty is not correct and legally tenable. However, it is clarified that in case the appellant or any of the co-sharers want to have a decree of partition prepared by the Registry, they shall have to file valuation report and also pay stamp duty."

5. Consequently, following the said decision inasmuch as the decree by itself does not create or extinguish any right but only declares the rights of the parties as already settled amongst them orally, the same shall be regarded as a declaratory decree. Thus the objection of the Registry that the parties must furnish a valuation report and pay stamp duty is not correct and is not legally tenable. The obvious corollary of this is that the Registry shall draw up the declaratory decree without insisting for the stamp duty under Section 2(15) of the Stamp Act.

6. The appeal is allowed as above.

BADAR DURREZ AHMED, J

ASHUTOSH KUMAR, J

FEBRUARY 08, 2017
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